ORDER OF THE PRESIDENT OF THE COURT
26 October 1994 *

In Case C-174/94 R,

French Republic, represented by E. Belliard, Directeur Adjoint, C. de Salins, Sous-Directeur, and H. Renié, Secrétaire Adjoint Principal in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri,

applicant,

v

Commission of the European Communities, represented by R. Wägenbaur, Principal Legal Advisor, and L. Gussetti, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the suspension of operation of Commission Decision 94/291/EC [notified under reference C(94) 637 final] of 27 April 1994 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case

* Language of the case: French.

VII/AMA/IV/93 — TAT — Paris (Orly) — Marseille and Paris (Orly) — Toulouse) (OJ 1994 L 127, p. 32),

THE PRESIDENT OF THE COURT

makes the following

Order

1 By application lodged at the Court Registry on 22 June 1994, the French Republic brought an application under Article 173 of the EC Treaty for Commission Decision 94/291/EC [notified under reference C(94) 637 final] of 27 April 1994 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/IV/93 — TAT — Paris (Orly) — Marseille and Paris (Orly) — Toulouse) (OJ 1994 L 127, page 32) to be declared null and void on the grounds that the rights of the defence were not observed, that the decision was vitiated by a misuse of powers and that it infringed Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8, hereinafter 'the regulation').

2 By a separate document lodged at the Court Registry on 21 September 1994, the French Republic brought an application for interim measures under Article 185 of the EC Treaty and Article 83 of the Rules of Procedure of the Court of Justice,

seeking suspension of the operation of the said Commission decision (hereinafter 'the contested decision') pending judgment in the action.

3 The Commission submitted its written observations on the application for interim measures on 6 October 1994.

4 The parties presented oral argument on 19 October 1994.

5 The background to the case should be outlined briefly.

6 TAT European Airlines (hereinafter 'TAT'), a company established in Tours (France), by letter of 21 June 1993 asked the Directorate General of Civil Aviation in the French Ministry of Infrastructure, Transport and Tourism for a licence to operate services between Paris (Orly) and Toulouse and Paris (Orly) and Marseille, referring in its request to the regulation.

7 The Director General of Civil Aviation refused the application by letter of 21 July 1993. The refusal was based on Article 5 of the regulation, which provides: 'On domestic routes for which at the time of entry into force of this Regulation an exclusive concession has been granted by law or contract, and where other forms of transport cannot ensure an adequate and uninterrupted service, such a concession may continue until its expiry date or for three years, whichever deadline comes first'.

8 In their letter the French authorities informed TAT that in accordance with that provision they could maintain the exclusive concession they had granted to Air Inter, which since then has formed part of the Air France group, by an agreement of 5 July 1985.

9 On 28 September 1993 TAT lodged a complaint with the Commission. In support of the complaint TAT claimed, firstly, that there had been an infringement of Articles 3(f), 86 and 90 of the EEC Treaty and failure to comply with the agreement of 30 October 1990 between the Commission, the French Government and Air France on the opening up to multiple designation — in other words, competition — of eight routes, including Paris-Toulouse and Paris-Marseille. In the alternative, TAT argued that the provisions of the regulation had been infringed. Secondly, TAT requested the Commission, on the basis of Article 175 of the EEC Treaty, to make a finding of those infringements and take all necessary measures to bring them to an end.

10 In its complaint TAT put forward the following arguments. Firstly, the Air France group's monopoly of the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes should have expired on 1 March 1992, as provided for in point 1.1.1 of the agreement of 30 October 1990. Secondly, Article 5 of the regulation did not apply to those routes, as Air Inter did not have an exclusive concession over the Paris-Marseille and Paris-Toulouse routes, since TAT provides services precisely on those routes from Charles de Gaulle airport. Finally, the discrimination against TAT was not compatible with the provisions of Article 8(1) of the regulation, according to which the regulation 'shall not affect a Member State's right to regulate without discrimination on grounds of nationality or identity of the air carrier, the distribution of traffic between the airports within an airport system'.

11 The list of airport systems in Annex II to the regulation includes *inter alia*, with reference to France, 'Paris-Charles de Gaulle/Orly/Le Bourget'.

12 By letter of 13 October 1993 sent to the Director General of the Commission's Directorate-General for Transport (DG VII), TAT added further submissions and requested the Commission to adopt a decision on the basis of Article 8(3) of the regulation. That provision states: 'At the request of a Member State or on its own initiative the Commission shall examine the application of paragraphs 1 and 2 and, within one month of receipt of a request and after consulting the Committee referred to in Article 11, decide whether the Member State may continue to apply the measure. The Commission shall communicate its decision to the Council and to the Member States.'

13 By letter of 20 October 1993 the Commission's Directorate-General for Competition (DG IV) forwarded a copy of TAT's complaint to the French authorities and to Air France, asking for their comments, if any. TAT's supplementary complaint was not sent with that letter.

14 In a letter of 22 October 1993 the Director-General of DG VII also notified the French authorities that TAT had submitted a complaint, but did not send them a copy. He also informed them that he regarded TAT's arguments as *prima facie* well founded.

15 In reply to that correspondence the French authorities, by letter of 21 December 1993, sent their observations on the substance of TAT's complaint. They argued that Article 5 of the regulation applied, since the opening up to multiple designation provided for in the abovementioned agreement of 30 October 1990, apart from services to Nice, related only to routes to or from Charles de Gaulle airport, so that Air Inter had retained its exclusive rights for those services to and from Orly.

16 In a letter of 21 January 1994 the Director-General of DG VII informed the French authorities that TAT had lodged a supplementary complaint and pointed out that Article 8(3) of the regulation gave the Commission power to adopt a decision.

17 In reply to that letter, the French authorities sent the Commission a note on 16 February 1994 summing up their position.

18 Following that exchange of correspondence, the Advisory Committee provided for in Article 11 of the regulation met on 28 February 1994. During that meeting the delegations of the Member States were able to state their opinions on the draft decision under Article 8(3) of the regulation sent to them by the Commission on 10 February 1994. The Advisory Committee's opinion stated: 'The majority of members present expresses the following opinion: on the basis of the information available to the Committee, it appears that the incorrect application by France of Article 5 has caused discrimination. However, a majority of the members is opposed to the taking of a decision on the basis of Article 8 of Regulation No 2408/92'.

19 On 17 March 1994 the French Government sent a further note to the Commission, repeating the observations of the French delegation at the meeting of the Advisory Committee.

20 Finally, at the request of the French Government, the Director of Legal Affairs in the Ministry of Foreign Affairs met the Director-General of the Commission's Legal Service on 30 March 1994, in order to discuss both that complaint and TAT's complaint relating to the Paris (Orly) — London route.

21 On 27 April 1994 the Commission adopted the contested decision, which reads:

'*Article 1*

France may not continue to refuse Community air carriers traffic rights on the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes on the grounds that the French authorities were applying Article 5 of Regulation (EEC) No 2408/92 on these routes.

Article 2

This Decision is addressed to the French Republic. It shall be communicated to TAT European Airlines, the Council of the European Union, the Member States, the Kingdom of Norway and the Kingdom of Sweden.

Article 3

France is required to give effect to this Decision by 27 October 1994 at the latest.'

22 According to the statement of reasons in the contested decision, the decision 'is not, however, intended in principle to prevent the continuation of an exclusive

concession for Air Inter on routes fulfilling the conditions laid down in Article 5', which, as interpreted by the Commission, 'is designed to ensure the survival of adequate transport services between two points (cities or regions) within the same Member State'.

23 The Commission also reiterated that the provisions of the regulation and 'Article 4 on public service obligations in particular are a way of ensuring continuity of services throughout the domestic route networks in the Member States, and of serving the objectives of regional development policy'.

24 Under Article 185 of the Treaty, the Court of Justice may, if it considers that circumstances so require, order the application of the contested act to be suspended.

25 Under Article 83(2) of the Rules of Procedure, an order for interim measures suspending operation of the contested measure is conditional on the existence of circumstances giving rise to urgency and pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

26 The Court has consistently held (see *inter alia* the Order in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraph 22) that the urgency of the interim

measures referred to in Article 83(2) of the Rules of Procedure must be assessed in relation to the necessity for interim relief in order to prevent serious and irreparable damage being caused by the immediate application of the measure against which the principal application is brought.

27 As regards urgency, the French Government argues, firstly, that the organization of the air transport system is based on the balancing of profitable and unprofitable routes. Air Inter's exclusive right over for the routes in question are justified by its obligation to operate regular services at non-prohibitive prices on unprofitable routes in order to contribute to regional development. The French Government considers that if the two routes in question were opened to competition, the market share of the new operators would amount to at least 35% after one year. Air Inter would then be forced to end the services on unprofitable routes. A draft law had admittedly been submitted to the French parliament to allow the payment of compensation to air carriers operating unprofitable routes, in accordance with Article 4 of the regulation. Such a provision could not, however, become operational until a balancing fund with the necessary finance had been set up, that being envisaged for late 1995. The French Government therefore claims to be unable to set up, in a few days, an alternative system compatible with Community law, having regard in particular to the time-limits under Article 4 of the regulation. If the contested decision were applied immediately, serious damage would thus be caused to the organization of air transport in France and to regional development policy.

28 Secondly, the French Government argues that once the two routes in question have been opened up to competition, the main application will become entirely redundant since the transitional period provided for in Article 5 of the regulation expires on 1 January 1996. If the decision on the substance of the case were favour-

able to the French Government, the opening up to competition required by the contested decision could no longer be challenged. The damage would thus be irreparable.

29 The Commission disputes the urgency arising from the irreparable nature of the damage which, if the Court refused a suspension of application, would be caused by the fact that the decision on the substance would effectively be given when the period provided for in Article 5 of the regulation expired.

30 Firstly, the Commission argues that Air Inter's internal balancing system does not function as the French Government claims and is not justified by reasons of regional development. The link between the traffic volume on the routes and their profitability has not been established, since Air Inter makes a loss on the principal routes and a profit on the minor routes. Moreover, it is not on the minor regional services, regarded as vital for reasons of regional development, that Air Inter makes a loss, but on its international network, on flights to Charles de Gaulle airport and on routes where there is competition from the TGV.

31 The Commission argues, secondly, that even if a balancing operation was performed within Air Inter in favour of the minor regional routes, the existence of those routes would not be threatened by the ending of the monopoly in question, since other air carriers with operating costs lower than those of Air Inter could take over any regional services which might be abandoned.

32 The Court notes, firstly, that the losses which Air Inter might incur as a result of the operation of the contested decision cannot be regarded as certain.

33 On this point the Commission, relying on confidential data whose accuracy is not challenged by the French Government, has submitted forecasts of market developments which contradict those of the French Government and appear no less probable.

34 Moreover, even assuming that the French Government's forecasts of Air Inter's losses are confirmed, the risk that some loss-making regional services operated by Air Inter would be given up is a mere hypothesis whose fulfilment is dependent on many uncertain factors.

35 Finally, even if such a hypothesis were fulfilled, there are no grounds for asserting that a decision to give up a route would be taken and implemented so unpredictably that it would be impossible for the French authorities to adopt any measures thought necessary for ensuring the maintenance of services, whether by inviting other airline companies who might have a commercial interest therein or by imposing public service obligations on the basis of Article 4 of the regulation.

36 In those circumstances, it must be held that the damage alleged by the French Government has not been established.

37 Consequently, the application for suspension of the operation of the contested decision must be dismissed, without it being necessary to consider whether the pleas put forward by the French Government establish a *prima facie* case for the measure sought.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The application for interim measures is dismissed;

2. The costs are reserved.

Luxembourg, 26 October 1994.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President